STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2008
v	No. 277838 Oakland Circuit Court
CHRISTIAN SIERRA, Defendant-Appellant.	LC No. 2005-205998-FC

Before: Whitbeck, C.J., and White and Zahra, JJ

PER CURIAM.

Defendant appeals on delayed leave granted, *People v Sierra*, unpublished order of the Court of Appeals, entered June 8, 2007 (Docket No. 277838), from an order made prior to his retrial that precluded an unavailable witness's prior testimony pursuant to MRE 804(b)(1). We affirm.

Defendant is charged with possession with intent to deliver 650 or more grams of a mixture containing cocaine, MCL 333.7401(2)(a)(i).[1] The charge is based on defendant's alleged involvement in a drug trafficking ring in which he purportedly transported large amounts of cocaine from New York City to Waterford, Michigan, where his brothers, Domingo and Oscar Sierra,[2] sold the drugs. Defendant was originally tried before a jury in December 2006. Those proceedings ended in a mistrial when the jury could not reach a unanimous verdict. At the original trial, the court admitted the video transcript of Lisa Vega's testimony at the 1999 trial of Domingo Sierra. Vega had been called as a prosecution witness at Domingo Sierra's trial because she was a drug dealer who purchased cocaine from Domingo and Oscar Sierra. At that trial, Vega testified that she did not know the current defendant. Defendant called Vega as a defense witness at his trial. However, Vega asserted her Fifth Amendment privilege against self-

[1] In 1997, this statutory subsection proscribed the delivery of 650 grams or more of cocaine. The statute has since been amended, and MCL 333.7401(2)(a)(i) now proscribes the delivery of 1,000 grams or more of cocaine. See 2002 PA 665.

[2] Domingo Sierra was convicted of possession with intent to deliver 650 or more grams of a mixture containing cocaine in 1999 and is currently serving a life sentence. Oscar Sierra has yet to be apprehended.

incrimination and refused to testify. Prior to defendant's retrial, the prosecution sought to preclude Vega's prior testimony, and defendant sought to have the video transcript admitted. On April 11, 2007, the trial court precluded the admission of the evidence pursuant to MRE 804(b)(1) because the prosecution did not have a "similar motive to develop the testimony" at Domingo Sierra's trial. This interlocutory appeal followed.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998).

> "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. . . ." "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." [*Maldano v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).]

We review preliminary questions of law, such as the interpretation of a rule of evidence, de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally inadmissible, MRE 802; however, there are exceptions when a witness is "unavailable" to testify at trial, MRE 804. The Michigan Supreme Court has found that a witness who cites the Fifth Amendment and declines to testify is "unavailable" for purposes of the hearsay exception. *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998). If the declarant is unavailable, former testimony is admissible as follows:

> Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. [MRE 804(b)(1).]

There are two requirements for evidence to be admissible under MRE 804(b)(1). First, "the testimony must have been made at 'another hearing.'" *People v Farquharson*, 274 Mich App 268, 272; 731 NW2d 797 (2007). Second, the party against whom the testimony is offered must have had "an opportunity and similar motive to develop the testimony." *Id.* at 275. This determination "depends on the similarity of the issues for which the testimony is presented at each proceeding." *Id.*, citing *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986). In *Farquharson*, *supra* at 278, this Court adopted the following "nonexhaustive list of factors" from *United States v DiNapoli*, 8 F3d 909 (CA 2, 1993) (en banc), to consider in determining whether an opposing party had a "similar motive to examine a witness at the prior proceeding:"

> (1) [W]hether the party opposing the testimony "had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue;" (2) the nature of the two proceedings—both what is at stake and the applicable burdens of proof; and (3) whether the party opposing the

testimony in fact undertook to cross-examine the witness (both the employed and the available but forgone opportunities).

Vega's testimony at Domingo Sierra's trial clearly amounts to testimony given at "another hearing of the same or a different proceeding . . . ." MRE 804(b)(1). However, the prosecutor did not have a similar motive to develop Vega's testimony at Domingo Sierra's trial. Put simply, the prosecutor was motivated to establish Domingo Sierra's guilt at Domingo Sierra's trial. The prosecution had direct evidence linking Domingo Sierra to the charged crime. The prosecutor had no motivation to establish the current defendant's role in the delivery of cocaine at Domingo Sierra's trial. However, Vega could have been asked questions that circumstantially linked defendant to the drug trafficking ring. Although the prosecutor had "an interest of substantially similar intensity to prove" the commission of the same crime at both trials, the prosecutor needed to prove the role of two separate players at each. See *Farquharson, supra* at 278. Accordingly, the trial court did not abuse its discretion in precluding Vega's prior testimony.

Both before the trial court and on appeal, defendant challenges the equity of excluding Vega's prior testimony given that the prosecutor has the power to grant Vega immunity but has declined to do so. "MRE 804(b)(1) is identical to FRE 804(b)(1)." *Vera, supra* at 415. We may review federal case law when interpreting a Michigan rule of evidence that is similar to a federal rule of evidence. *People v Katt*, 468 Mich 272, 280; 662 NW2d 12 (2003).

In *United States v Salerno*, 505 US 317; 112 S Ct 2503; 120 L Ed 2d 255 (1992), the Court rejected this very argument advanced by defendant. The Court refused to create an exception to FRE 804(b)(1), and, in fact, noted that the defendant's claim would require the Court to ignore FRE 804(b)(1). We agree, and reject defendant's claim to dispense with the "similar motive" requirement of MRE 804(b)(1).

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra